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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 184

**HENRY A. KIESELBACH AND OLGA M. KIESEL-
BACH, PETITIONERS,**

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED JUNE 27, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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BACH, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
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APPENDIX B TO
BRIEF FOR PETITIONER

APPENDIX B

DOCKET No. 98897

HENRY A. KISELBACH AND MRS. OLGA M. KISELBACH,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES:

For Taxpayer: Harry Friedman, Esq., Julien W. Newman, Esq.

For Comm'r: Arthur W. Carnduff, Esq., E. M. Woolf, Esq.

DOCKET ENTRIES

1939

- June 1—Petition received and filed. Taxpayer notified. (Fee paid).
- June 1—Copy of petition served on General Counsel.
- June 9—Notice of appearance of Julien W. Newman as counsel filed.
- July 1—Answer filed by General Counsel.
- July 1—Request for circuit hearing in Newark, New Jersey, filed by General Counsel.
- July 8—Notice issued placing proceeding on Newark, N. J., Calendar. Answer and request served.

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- May 17—Motion for leave to file amended answer; amended answer lodged, filed by General Counsel. 5/21/40 granted.
- June 20—Reply to amended answer filed by taxpayer. 6/20/40 copy served on General Counsel.
- July 6—Hearing set September 23, 1940, New York City.

Sept. 23—Hearing had before Mr. Murdock on merits. Petitioner's motion to amend petition. Petitioner ordered to file amended petition. Photostat of 1937 return filed. Stipulation of facts and supplemental stipulation of facts filed. Briefs due 1/2/41; reply briefs 15 days thereafter.

Sept. 24—Transcript of hearing of Sept. 23, 1940 filed.

Oct. 9—Amended petition filed by taxpayer. 10/10/40 copy served on General Counsel.

Nov. 26—Answer to amended petition filed by General Counsel. 11/27/40 copy served.

Dec. 17—Brief filed by taxpayer.

Dec. 28—Motion for extension of 30 days to file brief filed by General Counsel. 1/3/41 granted as to both parties.

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Feb. 1—Brief filed by General Counsel.

Feb. 3—Copy of brief served on General Counsel.

Apr. 24—Opinion rendered, Murdock, Div. 3. Decision will be entered under Rule 50. 4/26/41 copy served.

May 17—Motion for reconsideration and modification of the opinion by the division of the Board and if such modification is refused, motion for review by the Full Board and modification of the opinion of the division, filed by General Counsel.

May 20—Hearing set May 28, 1941 on motion.

May 28—Hearing had before Mr. Murdock on motion of respondent for reconsideration and modification of the opinion of the Division of the Board, C. A. V.

May 29—Order that report of Div. 3, promulgated April 24, 1941, be reviewed by the Board, entered.

June 6—Order that report and determination be affirmed, entered, Arundell, Div. 7.

June 10—Transcript of hearing 5/28/41 filed.

July 9—Computation of deficiency filed by General Counsel.

July 11—Hearing set July 30, 1941 on settlement.

July 17—Consent to settlement filed by taxpayer.

Aug. 5—Decision entered, Murdock, Div. 3.

Aug. 28—Order amending decision of Aug. 5, 1941, entered. Murdock, Div. 3.

Oct. 27—Petition for review by United States Circuit Court of Appeals, Third Circuit, filed by General Counsel.

- Oct. 29—Proof of service filed.
- Nov. 3—Proof of service of petition for review filed by General Counsel.
- Nov. 22—Motion for extension of time to Jan. 25, 1942 to prepare and transmit the record filed by General Counsel.
- Nov. 22—Order enlarging time to Jan. 24, 1942, to prepare and transmit the record, entered.
- Dec. 24—Statement of points filed by General Counsel—with proof of service thereon.
- Dec. 24—Agreed designation of portions of record; proceedings and evidence to be contained in record filed—with proof of service thereon.

IN THE UNITED STATES BOARD OF TAX APPEALS

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols JP-90D) dated May 5, 1939, and as a basis of this proceeding allege as follows:

(1) The petitioners are individuals residing at 45 Myrtle Avenue, Montclair, New Jersey. The return for the period here involved was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on May 5, 1939.

(3) The taxes in controversy are income taxes for the calendar years 1936 and 1937, and in the respective amounts of \$17.08 and \$2,809.82, a total of \$2,826.90, all of which is in dispute.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The respondent in computing the deficiency for

the year 1936 erred in failing to deduct from the total tax liability the sum of \$17.08 paid by the petitioners to the Collector of Internal Revenue at Newark, New Jersey on October 4, 1938.

2. The respondent in computing the deficiency for the year 1937 erred in taxing as ordinary income, the sum of \$15,245.57, part of an award received by the petitioner on the condemnation of property, the profit on which is taxable as capital gain.

3. The respondent in computing the deficiency for 1937 erred in including in income 40%, instead of 30%, of the capital gain realized by petitioners on the sale of property.

(5) The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(1A) The petitioners filed their tax return for the year 1936 with the Collector of Internal Revenue at Newark, New Jersey. There was assessed and paid on said return a tax of \$665.95.

(1B) On September 24, 1938, petitioners were notified by the respondent of a proposed deficiency of \$17.08 for the year 1936, and on October 4, 1938 paid said sum, together with interest thereon in the amount of \$1.58, a total of \$18.66, to the Collector of Internal Revenue at Newark, New Jersey.

(1C) The respondent, in computing the deficiency for the year 1936, as shown in his letter dated May 5, 1939, did not deduct from the total tax liability the payment made by the petitioners, as set out in the preceding paragraph.

(2A) The petitioners, on April 2, 1927, acquired property consisting of improved real estate located at 293 Atlantic Avenue, Brooklyn, New York. This property, with the exception of 400 square feet, was

condemned by the City of New York on January 3, 1933, and title to the portion of the property condemned passed to the City on said date.

(2B) On May 20, 1935, an award to the petitioners in the amount of \$58,000.00 was published. The New York law provided that upon the condemnation of property, the title passed to the City of New York and interest at the legal rate should be allowed "as part of the compensation to which the owners are entitled" from the date of the taking to the date of payment.

(2C) Pursuant to the award, there was paid to the petitioners on May 12, 1937, the sum of \$73,246.57. The petitioners reported the gain on the sale of the property as capital gain and included 30% thereof in income on the tax return for the year 1937. The respondent, in the deficiency letter, segregated \$15,246.57 of the award as representing interest from January 3, 1933 to the date of payment of the award, including said sum of \$15,246.57 in ordinary income.

(3A) The petitioners filed the return for 1937 on the cash receipts and disbursements basis.

(3B) The sale of the property to the City of New York was not a completed transaction for tax purposes until May 12, 1937. Therefore, the petitioners held said property from April 2, 1927 to May 12, 1937, a period of more than 10 years.

WHEREFORE, the petitioners pray that the Board may hear the proceeding and

1. Disallow the deficiencies proposed.
2. Allow the petitioners credit for the payment of the taxes in the amount of \$17.08 for the year 1936.
3. Decide that the interest on the award was part of the award and should be included in income as capital gain, rather than ordinary income.

4. Decide that the petitioners held the property for more than 10 years, and that only 30% of the gain thereon should be included in taxable income.

/s/ HARRY FRIEDMAN

Harry Friedman,

538 Munsey Building, Washington, D. C.

/s/ JULIEN W. NEWMAN

Julien W. Newman,

39 Broadway, New York, New York,

Counsel for Petitioners.

STATE OF NEW YORK }
County of New York }^{38:}

o Henry A. Kieselbach and Olga M. Kieselbach being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition, and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that these they believe to be true.

/s/ HENRY A. KIESELBACH

Henry A. Kieselbach

/s/ OLGA M. KIESELBACH

Olga M. Kieselbach

Subscribed and sworn to before me this 31st day of May, 1939.

/s/ PAULITA ANDREWS

Notary Public New York County Clerk's No. 105

New York County Register's No. 1A186

Commission expires March 30, 1941.

EXHIBIT "A"

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Office of

Internal Revenue Agent in Charge

Newark, N. J. Division

MAY 5, 1939.

Mr. HENRY A. KIESELBACH and
Mrs. OLGA M. KIESELBACH, Husband and Wife,
43 Myrtle Avenue, Montclair, New Jersey.

SIR AND MADAM: You are advised that the determination of your income tax liability for the taxable years ended December 31, 1936 and 1937 discloses a deficiency of \$2,826.90, as shown in the Statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Newark, New Jersey, for the attention of JP-90D. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after

filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, *Commissioner,*

By _____

Internal Revenue Agent in Charge.

Enclosures:

Statement.

Form of waiver.

JP/hgb

STATEMENT

JP-90D.

Mr. Henry A. Kieselbach and Mrs. Olga M. Kieselbach, Husband and Wife, 43 Myrtle Avenue, Montclair, New Jersey.

Tax Liability for the Taxable Years Ended December 31, 1936 and 1937.

Year	Liability	Assessed	Deficiency
1936	\$683.05	\$665.95	\$17.08
1937	4,681.74	1,871.92	2,809.82
Total	5,364.77	2,537.87	2,826.90

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 25, 1938; to your protest dated October 18, 1938; and to the statements made at the conference held on February 28, 1939.

A copy of this letter and statement has been mailed to your representative, Mr. Harry Friedman, 538 Munsey Building, Washington, D. C., in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

TAXABLE YEAR ENDED DECEMBER 31, 1936

Adjustments to Net Income

Net income as disclosed by return.....	\$13,411.47
Unallowable deductions and additional income:	
(a) Additional taxable gain from the retirement of 7% cumulative preferred stock of the Orange and Rock- land Electric Company.....	161.20
Net income adjusted.....	\$13,572.67

EXPLANATION OF ADJUSTMENTS

(a) In accordance with the provisions of Section 115 (c) of the Revenue Act of 1936 and Article 115-5 of Regulations 94, the gain of \$403.00 realized by you from the retirement of 7% cumulative preferred stock of the Orange and Rockland Electric Company is taxable in its entirety. Inasmuch as on your return only 60%, or \$241.80, of the gain realized from this retirement was reported as taxable income, an adjustment of \$161.20 is necessary in order to reflect your correct taxable net income.

Computation of Tax

Net income adjusted.....	\$13,572.67
Less:	
Personal exemption.....	\$2,500.00
Credit for dependents.....	733.33
	<hr/> 3,233.33
Balance (surtax net income).....	10,339.34
Less:	
Earned income credits (10% of \$13,572.67).....	1,357.27
	<hr/> 8,982.07
Net income subject to normal tax.....	8,982.07
Normal tax at 4% on \$8,982.07.....	359.28
Surtax on \$8,339.34 (amount in excess of \$4,000.00).....	323.75
	<hr/> 683.03
Total tax.....	683.03
Correct income tax liability.....	683.03
Income tax assessed:	
Original, account No. 201115.....	683.86
	<hr/> 17.08
Deficiency of income tax.....	17.08

TAXABLE YEAR, ENDED DECEMBER 31, 1937

Adjustments to Net Income

Net income as disclosed by return.....	\$22,123.10
Unallowable deduction and additional income:	
(a) Interest.....	15,246.57
Total.....	37,369.67
Nontaxable income and additional deductions:	
(b) Adjustment of capital net gain.....	2,158.71
Net income adjusted.....	35,210.96

EXPLANATION OF ADJUSTMENTS

(a) The examination disclosed that on May 12, 1937 you received from the City of New York the amount of \$73,246.57, representing an award of \$58,000.00 made to you for property condemned for public purposes and interest thereon in the amount of \$15,246.57 for the period dating from January 3, 1933 (the date the City of New York took title to the property giving rise to the award) to May 12, 1937 (the date of payment of the award).

It is your contention that this interest of \$15,246.57 is part of the award itself, being, in fact, compensation for the taking of property, and that it should be taxed, not as ordinary income, but as the award itself, that is, as capital gain. On your return this item of interest has been treated as part of the award itself, subject to tax as capital gain.

The Bureau holds that the aforesaid interest is compensation, not for the property itself, but for the use of money due, and that it is subject to tax as ordinary income.

In support of its position, your attention is directed to the case of *Jamieson Associates, Inc. et al. v. Commissioner of Internal Revenue*, 37 B. T. A. 92, in which the identical issue is involved. In that case it was

held that the interest was compensation, not for the property taken, but for the use of money due. In its opinion, the Board quotes as follows from the decision rendered in the case of *Woodward Brown Realty Co., v. City of New York*, 193 N. Y. S. 162 (203 App. Div. 625):

The theory of the law is that where land is taken from a private owner by the right of eminent domain for a public use, payment of the value thereof should be coincident with the taking, and if for any reason payment is postponed the right to interest, from the date of the taking of the property until the date of payment, follows as a matter of constitutional right. People ex rel. Central Trust Co. * * *

The Board held:

* * * Section 976 of the Greater New York City charter provides that, where property is condemned by the city 'Interest at the legal rate upon the sum or sums to which the owners are justly entitled * * * shall be awarded * * * as part of the compensation to which the owners are entitled'. This interest is compensation, but not compensation for the property itself, not for the capital. It is interest upon and compensation for use of money due. If petitioners had, on July 15, 1925, when their properties were taken by the city, been actually paid the then value, there would have been no interest paid them, but they were not paid anything until 1931. The judgment of June 9, 1931, does not mention interest, but merely itemized the amounts awarded. The 'final decree' prepared in accordance with the judgment adds interest to the awards already computed. We hold that such interest was taxable income to the petitioners in 1931 at ordinary rates, and that the respondent did not err in so determining. * * *

In view of the above, your contention has been denied, and the item of interest of \$15,246.57 has been treated as ordinary income subject to income tax at ordinary rates.

(b) The examination disclosed that the taxable portion of the capital net gain realized by you in the condemnation proceedings referred to under item (a) of this schedule was overstated on your return in the amount of \$2,158.71.

The records disclose that the property taken in these proceedings was acquired by you through inheritance on April 2, 1927; that the City of New York took title to the property on January 3, 1933; that the award was published on May 20, 1935; and that you received the award and interest thereon on May 12, 1937.

It is your contention that, inasmuch as the transaction was, for income tax purposes, not finally consummated until May 12, 1937, the period during which the property was held by you extends from April 2, 1927 to May 12, 1937, (a period in excess of 10 years) and that, in accordance with the provisions of Section 117 (a) of the Revenue Act of 1936, the net gain derived from the award should be taxed at the rate of 30% thereof. You contend further that a contrary ruling must eliminate the entire gain from the year 1937.

The Bureau's files disclose that your returns for the years 1933 to 1937, inclusive, were prepared and filed upon the basis of cash receipts and disbursements. The fact that, upon this basis of reporting, the net gain derived from the award did not become subject to the imposition of income tax until actually realized has, obviously, no bearing upon the facts relating to the period during which the property giving rise to

the award was held by you. The Bureau holds that the property was held by you from April 2, 1927, the date of its acquisition, to January 3, 1933, the date on which the City of New York took title to the premises. This period being more than five years but not more than ten years, the gain derived from the award is taxable to the extent of 40% thereof.

In view of the above, your contention has been denied.

The computation of the overstatement of taxable net gain on your return follows:

Amount of award.....		\$58,000.00
Less:		
Attorney fees and disbursements.....	\$2,479.39	
Assessment for Jay Street opening.....	824.92	
		<u>3,304.31</u>
Balance.....		\$54,695.69
Basis of cost of property condemned:		
Building.....	\$15,000.00	
Less:		
Depreciation allowed or allowable for the period April 2, 1927 to January 3, 1933, inclusive, (5 years and 9 months at 2½% per annum).....	2,156.25	
Unrecovered cost of building.....		\$12,843.75
Land, total plot of 2,000 square feet.....	\$35,000.00	
Less:		
Cost, of 400 square feet not taken in the proceedings.....	5,040.00	
Cost of land.....		<u>29,960.00</u>
Total cost of building and land.....		<u>42,803.75</u>
Net gain.....		\$11,891.94
Percentage of net gain to be taken into account under the provisions of Section 117 (a) of the Revenue Act of 1936.....		+40%
Taxable net gain 40% of \$11,891.94 or.....		\$4,756.78
Taxable net gain, reported on the return.....		<u>6,915.49</u>
Overstatement of taxable net gain on the return.....		2,158.71

Computation of Tax

Net income adjusted.....		\$35,210.96
Less:		
Personal exemption.....	\$2,500.00	
Credit for dependents.....	400.00	
		<u>2,900.00</u>
Balance (surtax net income).....		\$32,310.96
Less:		
Earned income credit (10% of \$14,000.00).....		1,400.00
Net income subject to normal tax.....		\$30,910.96
Normal tax at 4% on \$30,910.96.....		\$1,236.44
Surtax on \$28,310.96 (amount in excess of \$4,000.00).....		<u>3,445.30</u>
Total tax.....		\$4,681.74
Correct income tax liability.....		\$4,681.74
Income tax assessed:		
Original, account No. 202000.....		<u>1,871.92</u>
Deficiency of income tax.....		\$2,809.82

UNITED STATES BOARD OF TAX APPEALS

ANSWER

Comes now the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits, denies and avers as follows:

(1). and (2) Admits the allegations set forth in paragraphs (1) and (2) of the petition.

(3) Admits that the taxes in controversy are income taxes for the year 1937, and denies that they are in controversy for the year 1936 as alleged in paragraph (3) of the petition, but neither admits nor denies the remaining allegations of said paragraph and demands strict proof thereof.

(4) 1., 2. and 3. Denies that the respondent erred as alleged severally in subparagraphs 1., 2. and 3. of paragraph (4) of the petition.

(5) (1A) and (1B) Admits the allegations set forth in subparagraphs (1A) and (1B) of paragraph (5) of the petition.

(1C) Neither admits nor denies the allegations set forth in subparagraph (1C) of paragraph (5) of the petition.

(2A) Admits that petitioners acquired said property on April 2, 1927, and that a portion thereof was condemned by the City of New York on January 3, 1933 as alleged in subparagraph (2A) of paragraph (5) of the petition, but neither admits nor denies the remaining allegations of said subparagraph, and demands strict proof thereof.

(2B) Admits that an award was made to petitioners as alleged in subparagraph (2B) of paragraph (5) of the petition, on May 20, 1935, in the principal sum of \$58,000.00, but neither admits nor denies the remaining allegations of said subparagraph, and demands strict proof thereof.

(2C) Admits the allegations set forth in subparagraph (2C) of paragraph (5) of the petition.

(3A) Admits the allegations set forth in subparagraph (3A) of paragraph (5) of the petition.

(3B) Denies the allegations set forth in subparagraph (3B) of paragraph (5) of the petition.

(6) Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,

H. C. C.

J. P. Wenchel,

Chief Counsel, Bureau of Internal Revenue

OF COUNSEL:

HARTFORD ALLEN,

Division Counsel,

HENRY C. CLARK,

Special Attorney,

Bureau of Internal Revenue.

HCC/dms

AMENDED ANSWER

UNITED STATES BOARD OF TAX APPEALS

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed herein, admits, denies and alleges as follows:

(1). Admits the allegations of paragraph (1) of the petition.

(2). Admits the allegations of paragraph (2) of the petition.

(3). Admits that the taxes in controversy are income taxes for the calendar years 1936 and 1937, but denies the remaining allegations of paragraph 3 of the petition.

Alleges that the correctness of the Commissioner's determination that there is a deficiency in income tax for the year 1936 in the amount of \$17.08 is not disputed in the petition.

Alleges that the correct deficiency in income tax for the year 1937 is \$4,899.49 as shown in the statement attached hereto as Schedule 1 and made a part hereof, and as alleged in said Schedule 1.

Alleges that the deficiency of \$2,809.82 for the year 1937 as proposed in the notice of deficiency attached to the petition should be increased in the amount of \$2,089.67.

Alleges that the gain derived by these petitioners because of the condemnation of their property and the award granted and paid to them pursuant thereto (as alleged in the petition and admitted by this Amended Answer) was ordinary gain, taxable in the full amount of the said gain as ordinary income and not as capital gain.

Alleges that the interest upon said award was taxable as ordinary income and not as capital gain.

Alleges that the depreciation upon the building on the property described in the petition was sustained by these petitioners for 8 years and 3 months and not for 5 years and 9 months as stated in the notice of deficiency, and that the correct amount of depreciation sustained by those petitioners upon said building was \$3,093.75 and not \$2,156.25 as stated in the notice of deficiency.

Alleges that the increased deficiency for the year 1937, for which claim is hereby made, results from the determination that the gain resulting from the condemnation of property and the payment of an award pursuant thereto, with interest, to the petitioners is ordinary gain, taxable as ordinary income and not as capital gain, and that the interest paid upon said award is ordinary gain, taxable as ordinary income and not as capital gain and that in computing said gain, depreciation upon the building described in the petition was sustained by the petitioners for 8 years and 3 months and not for 5 years and 9 months, and that the correct depreciation to be taken into account in computing said gain is \$3,093.75 and not \$2,156.25.

Alleges that the correct taxable net income of the petitioners for the taxable year ended December 31, 1937 is \$43,283.62 and not \$35,210.96 as stated in the notice of deficiency attached to the petition, and that the items and details of the said increase of \$8,072.66 in taxable net income over the taxable net income stated in the notice of deficiency are shown in Schedule 1 attached hereto and made a part hereof.

(4), 1, 2 and 3. Denies that the respondent erred as alleged in paragraph (4) of the petition and all subparagraphs thereof.

(5), (1A). Admits the allegations of subparagraph (1A) of paragraph (5) of the petition.

(1B).. Admits the allegations of subparagraph (1B) of paragraph (5) of the petition except that it is denied that said sum of \$17.08 and \$1.58 interest thereon was paid on October 4, 1938. Alleges that the petitioners paid to the Collector of Internal Revenue at Newark, New Jersey, on October 8, 1938 the sum of \$17.08 and \$1.58. Alleges that the deficiency of \$17.08 for the calendar year 1936 as stated in the notice of deficiency attached to the petition has not been assessed. Alleges that the petitioners have not contested the correctness of the Commissioner's determination of the petitioner's income tax liability for the calendar year 1936 and have not alleged that the Commissioner erred in determining a deficiency in income taxes due from the petitioners for the calendar year 1936 in the amount of \$17.08 as stated in the notice of deficiency attached to the petition. Alleges that the petitioners have not stated any facts sustaining any allegation of error in respect of the determination of their income tax liability for the year 1936 and have not alleged any error or stated any facts contesting the Commissioner's determination of their income tax liability for the year 1936 as shown in the notice of deficiency attached to the petition.

(1C). Admits the allegations of subparagraph (1C) of paragraph (5) of the petition.

(2A). Admits the allegations of subparagraph (2A) of paragraph (5) of the petition except that it is denied that the title to the portion of the property condemned passed to the City of New York on January 3, 1933..

(2B). Admits that on May 20, 1935 an award to the petitioners in the amount of \$58,000 and interest was published, but denies the remaining allegations

of subparagraph (2B) of paragraph (5) of the petition.

(2C). Admits the allegations of subparagraph (2C) of paragraph (5) of the petition, except that it is denied that the gain as reported by the petitioners was the correct amount of gain derived from said condemnation and award. Admits that pursuant to said award the petitioners received on May 12, 1937 the sum of \$58,000 plus interest of \$15,246.57, or a total of \$73,246.57, because of said award, and that the cost basis as of April 2, 1927 of \$35,000 for all of the land (including the 400 feet not taken by the condemnation proceedings), and of \$15,000 for the building as reported in the return of the petitioners was correct.

(3A). Admits the allegations of subparagraph (3A) of paragraph (5) of the petition.

(3B). Denies the allegations of subparagraph (3B) of paragraph (5) of the petition.

6. Denies generally and specifically each and every allegation of the petition not herein specifically admitted or denied.

Further answering the petition, respondent alleges:

7. The petitioners acquired the property at 293 Atlantic Avenue, Brooklyn, New York, described in subparagraph (2A) of paragraph (5) of the petition, on April 2, 1927 at a cost basis of \$35,000 for the land and \$15,000 for the building, and said property was condemned by the City of New York on January 3, 1933 (except 400 square feet of land thereof), and on May 20, 1935 an award of \$58,000 was published pursuant to said condemnation, and on May 12, 1937 said award of \$58,000 plus \$15,246.57 interest thereon, or a total of \$73,246.57, was paid to the petitioners. The petitioners occupied the said property and had possession thereof and collected rent therefrom and enjoyed the use and benefit of said property until June 30, 1935,

which said date was 8 years and 3 months after petitioners had acquired the said property. The said building was subject to depreciation for said period. The net gain to petitioners as a result of the taking of the said property and the payment therefor was \$28,076.01 as is shown by Schedule 1 attached hereto and made a part hereof.

The said net gain was ordinary gain and not capital gain.

The correct net taxable income of the petitioners for the taxable year ended December 31, 1937 is \$43,283.62 and the total tax liability of the petitioners for said year is \$6,771.41 and there is a deficiency in income taxes due from the petitioners for said year in the amount of \$4,899.49 as is set forth in Schedule 1 attached hereto and made a part hereof.

WHEREFORE, it is prayed:

1. That the Board find that there is a deficiency in income tax due from these petitioners for the calendar year 1936 in the amount of \$17.08.

2. That the appeal be denied with respect to the errors alleged in the petition

3. That the Board hear this appeal and redetermine the tax liability of these petitioners for the year 1937 on the basis of the affirmative relief herein requested and that the Board redetermine the income tax liability of these petitioners for the year 1937 in accordance with the computation attached hereto as Schedule 1.

4. That the Board allow the increased deficiency as herein alleged and find that there is a deficiency in income taxes for the calendar year 1937 due from these petitioners in the amount of \$4,899.49 for which increased deficiency claim is hereby made.

5. That the Board grant the affirmative relief herein prayed for and find that the deficiency in income tax of \$2,809.82 for the calendar year 1937 as stated in the

notice of deficiency should be increased in the amount of \$2,089.67 and that the correct deficiency for said year is \$4,899.49.

(Signed) J. P. WENCHEL,

A. W. C.

J. P. Wenchel,

Chief Counsel, Bureau of Internal Revenue.

OF COUNSEL:

HARTFORD ALLEN,

Division Counsel,

ARTHUR W. GARNDUFF,

Special Attorney,

Bureau of Internal Revenue.

AWC/mrc

SCHEDULE 1

STATEMENT OF INCOME TAX LIABILITY OF HENRY A. KISSELBACH AND MRS. OLGA M. KISSELBACH (HUSBAND AND WIFE) FOR THE TAXABLE YEAR ENDED DECEMBER 31, 1937.

Net Income

Net income as shown in the deficiency notice dated May 5, 1939,

a copy of which is attached to the petition..... \$35,210.96

As adjusted..... 43,283.62

Difference (net addition)..... \$8,072.66

The net addition to taxable income of \$8,072.66 results from the determination:

First,—No part of the gain realized by the taxpayers on disposition of their property under condemnation proceedings brought by the City of New York, is subject to the limitation provided by Section 117 (a) of the Revenue Act of 1936 and, therefore, the entire net gain of \$28,076.01 is subject to income tax in lieu of the amount of \$20,003.35 (\$15,246.57 plus \$4,756.78) which is reflected in the statutory deficiency notice, or a

net increase of \$8,072.66 in the net gain previously determined.

Second.—In arriving at the corrected net gain of \$28,076.01, the allowance for depreciation sustained on the building is computed as \$3,093.75 at $2\frac{1}{2}\%$ per annum, on the cost of \$15,000.00, for 8 years, 3 months, from April 2, 1927 to June 30, 1935, instead of \$2,156.25, representing depreciation for 5 years, 9 months from April 2, 1927 to January 3, 1933, as shown in the deficiency notice.

Explanation of Adjustment (Addition)

The net income of \$35,210.96 as shown in the deficiency notice, dated May 5, 1939, referred to above, is increased by \$8,072.66, representing additional gains realized as the result of condemnation proceedings brought by the City of New York. The computation of the additional gain is as follows:

Amount received as award		\$73,246.57
Less:		
Attorneys' fees and disbursements	\$2,479.39	
Assessment for Jay Street opening	824.92	
		3,304.31
Balance		\$69,942.26
Deduct: Basis of property condemned:		
Cost of building	\$15,000.00	
Less: Depreciation sustained at the rate of $2\frac{1}{2}\%$ per annum for 8 years, 3 months	3,093.75	
		\$11,906.25
Cost of land, total plot of 2,000 square feet	\$35,000.00	
Less: Cost of 400 square feet not involved in proceedings	5,040.00	
		29,960.00
Total cost of building and land		41,866.25
Net gain		\$28,076.01

Less: Amounts reflected as taxable income in the deficiency notice dated May 5, 1939, as follows:

Amount treated as interest received in adjustment (a) of the deficiency notice----- \$15,246.57

Amount treated as capital net gain, under adjustment (b) of the deficiency notice (40% of \$11,891.94)----- 4,756.78

20,003.35

Net addition (increase in net income)----- \$8,072.66

Computation of Tax

Net income as adjusted as above----- \$43,283.62

Less:

Personal exemption----- \$2,500.00

Credit for dependent----- 400.00

2,900.00

Balance (Surtax net income)----- \$40,383.62

Less: Earned income credit (10% of \$14,000.00)----- 1,400.00

Net income subject to normal tax----- \$38,983.62

Normal tax at 4% on \$38,983.62----- \$1,559.34

Surtax on \$40,383.62----- 5,212.07

Total tax liability----- \$6,771.41

Tax previously assessed: Original account #203300----- 1,871.92

Deficiency in assessment----- \$4,899.49

AMENDED PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols JP-90D) dated May 5, 1939, and as a basis of this proceeding allege as follows:

(1) The petitioners are individuals residing at 43 Myrtle Avenue, Montclair, New Jersey. The return for the period here involved was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on May 5, 1939.

(3) The taxes in controversy are income taxes for the calendar years 1936 and 1937, and in the respective amounts of \$17.08 and \$2,809.82, a total of \$2,826.90, all of which is in dispute.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The respondent in computing the deficiency for the year 1936 erred in failing to deduct from the total tax liability the sum of \$17.08 paid by the petitioners to the Collector of Internal Revenue at Newark, New Jersey, on October 4, 1938.

2. The respondent in computing the deficiency for the year 1937 erred in taxing as ordinary income the sum of \$15,246.57, part of an award received by the petitioner on the condemnation of property, the profit on which is taxable as capital gain.

3. The respondent in computing the deficiency for 1937 erred in including in income 40% instead of 30%, of the capital gain realized by petitioners on the sale of property.

(5) The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(1A) The petitioners filed their tax return for the year 1936 with the Collector of Internal Revenue at Newark, New Jersey. There was assessed and paid on said return a tax of \$665.95.

(1B) On September 24, 1938, petitioners were notified by the respondent of a proposed deficiency of \$17.08 for the year 1936, and on October 4, 1938 paid said sum, together with interest thereon in the amount of \$1.58, a total of \$18.66, to the Collector of Internal Revenue at Newark, New Jersey.

(1C) The respondent, in computing the deficiency for the year 1936, has shown in his letter dated May 5, 1939, did not deduct from the total tax liability the

payment made by the petitioners, as set out in the preceding paragraph.

(2A) The petitioners on April 2, 1927, acquired property consisting of improved real estate located at 293 Atlantic Avenue, Brooklyn, New York. This property, with the exception of 400 feet, was condemned by the City of New York, pursuant to Section 976 of the Greater New York Charter, in a proceeding filed on December 30, 1930, in the Supreme Court of the State of New York in and for the Second Judicial District. The final decree in that proceeding was entered on March 31, 1937. The petitioner and the City of New York had a right of appeal from this final decree, the time for which expired on April 30, 1937.

(2B) The just compensation awarded to the petitioners in the said proceeding was \$73,246.57.

(2C) Pursuant to the award, there was paid to the petitioners on May 12, 1937, the sum of \$73,246.57. The petitioners reported the gain on the sale of the property as capital gain and included 30% thereof in income on the tax return for the year 1937. The respondent, in the deficiency letter, segregated \$15,246.57 of the award as representing interest from January 3, 1933 to the date of payment of the award, including said sum of \$15,246.57 in ordinary income.

(3A) The petitioners filed the return for 1937 on the cash receipts and disbursements basis.

(3B) The sale of the property to the City of New York was not a completed transaction for tax purposes until May 12, 1937. Therefore, the petitioners held said property from April 2, 1927 to May 12, 1937, a period of more than 10 years.

WHEREFORE, the petitioners pray that the Board may hear the proceeding and

1. Disallow the deficiencies proposed.

2. Allow the petitioners credit for the payment of the taxes in the amount of \$17.08 for the year 1936.

3. Decide that the "interest" on the award was part of the award and should be included in income as capital gain, rather than ordinary income.

4. Decide that the petitioners held the property for more than 10 years, and that only 30% of the gain thereon should be included in taxable income.

(Signed) HARRY FRIEDMAN

Harry Friedman,

538 Munsey Building, Washington, D. C.

(Signed) JULIEN W. NEWMAN

Julien W. Newman,

39 Broadway, New York, New York.

Counsel for Petitioners.

STATE OF NEW YORK }
County of New York } ss:

Henry A. Kieselbach and Olga M. Kieselbach being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition, and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those they believe to be true.

(Signed) HENRY A. KIESELBACH

Henry A. Kieselbach

(Signed) OLGA M. KIESELBACH

Olga M. Kieselbach

Subscribed and sworn to before me this 7th day of October, 1940.

(Signed) PAULITA ANDREWS

Notary Public New York County Clerk's No.

105 New York County Register's No. 1186

Commission expires March 30, 1941

UNITED STATES BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION

Now comes the respondent, the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

1 and 2. Admits the averments contained in paragraphs (1) and (2) of the amended petition.

3. Denies the averments contained in paragraph (3) of the amended petition.

4. Denies the allegations of error contained in paragraph (4) of the amended petition and all subparagraphs thereof.

5. Denies the averments contained in paragraph (5) of the amended petition and all subparagraphs thereof.

6. Denies generally and specifically all allegations in the amended petition not herein admitted or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,

W. R. L.

J. P. Wenchel

Chief Counsel, Bureau of Internal Revenue.

OF COUNSEL:

HARTFORD ALLEN,

Division Counsel,

WILLIS R. LANSFORD,

Special Attorney,

Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

STIPULATION OF FACTS

It is hereby stipuated by and between the parties hereto, by their respective attorneys, that the following

facts shall be taken as true upon the trial of the foregoing case, subject to the right of either party to object to the relevancy or materiality of any of the facts herein stated, and subject further to the right of either party to introduce other and further evidence not inconsistent with any of the facts herein stated:

1. The petitioners, Henry A. Kieselbach and Olga M. Kieselbach, are husband and wife and reside at 43 Myrtle Avenue, Montclair, New Jersey. They filed joint returns for the years 1936 and 1937 with the Collector of Internal Revenue for Fifth District of New Jersey at Newark, New Jersey.

2. The petitioner, Henry A. Kieselbach, on April 2, 1927, inherited from his father, Henry C. Kieselbach, property consisting of improved real estate located at 293 Atlantic Avenue, Brooklyn, New York, having a fair market value of \$50,000.00, apportioned \$35,000.00 to land and \$15,000.00 to the building and improvements. The area of the land was 2000 square feet.

3. The City of New York in a proceeding entitled "In the Matter of the Application of the City of New York, relative to acquiring title wherever, the same has not been heretofore acquired for the same purpose in fee to the lands, tenements and hereditaments required for the purpose of opening and extending Jay Street from Nassau Street to Fulton Street, Smith Street from Fulton Street to Atlantic Avenue, and Schermerhorn Street from Smith Street to a point about 50 feet east of 3rd Avenue where not heretofore acquired in fee by the City of New York for rapid transit purposes in the Borough of Brooklyn, City of New York," filed on December 30, 1930 in the Supreme Court of the State of New York in and for the Second Judicial District, asked the Court for authority to con-

demn the building and improvements and 1600 square feet of the land, described in Paragraph 2 hereof. The petitioner's particular parcel was designated as Damage Parcel No. 268. An order granting the said application was entered by the said Court on December 30, 1930. It provided: "That the compensation which should justly be made to the respective owners of the property proposed to be taken, be ascertained by this Court, without a jury, and that the cost, and expenses of such improvement be assessed by this Court, in accordance with the resolution adopted by the Board of Estimate and Apportionment on the 6th day of June, 1930."

4. The proposed condemnation was pursuant to Sec. 976 of the Greater New York Charter, which is made a part hereof by reference with the same effect as if incorporated herein verbatim.

5. No deposit or other security to cover just compensation was made or provided by the City at the time it filed the said application to condemn or at any other time during the pendency of the Court proceeding.

6. Article 1, Section 7, Paragraph (a) of the Constitution of the State of New York provides that "Private property shall not be taken for public use without just compensation."

7. On July 2, 1931, the taxpayer filed his formal claim for just compensation in the pending condemnation proceedings. On December 16, 1932, the Board of Estimate and Apportionment passed the following resolution:

"Resolved, That the Board of Estimate and Apportionment, in pursuance of the provisions of section 976 of the Greater New York Charter, as amended, directs that upon the 3d day of January, 1933, the title in fee to the real property

lying within the lines of said Jay street from Nassau street to Fulton street; and Smith street from Fulton street to Atlantic avenue; where not heretofore vested, in the Borough of Brooklyn, City of New York, so required, shall become vested in The City of New York."

8. The condemnation proceeding was tried between March 25, 1933, and February 19, 1935 and on February 17, 1936 the Court entered its tentative decree fixing tentative awards and assessments. This tentative decree was later published. On March 10, 1936, the taxpayer filed objections to the said tentative decree. Hearings were had on the objections of the taxpayer and others on March 23, 1936, and April 3d and 7th, 1936. The amount of the assessment against petitioner was reduced upon consideration of his objections.

9. Thereafter on March 31, 1937, the Court entered a final decree. It provided that the amount awarded to the respective property owners, including the petitioner, constituted and was "the just compensation which the respective owners are entitled to receive from The City of New York."

10. Under the laws of New York, both the City and the petitioner had a right of appeal from this final decree, said appeal to be taken within thirty days after notice of the filing of said final decree. No appeal was taken by the petitioner or by the City with respect to the parcel owned by the petitioner. Payment of \$73,246.57, the amount of the award referred to in Paragraph 9 hereof, was made to the petitioner on May 12, 1937. The amount of said payment was computed by adding to the principal amount of \$58,000.00, interest thereon as provided by Section 976 of the Greater New York Charter, in the sum of \$15,246.57, computed at

the rate of 6% per annum from January 3, 1933 to May 12, 1937, or a total of \$73,246.57.

11. The petitioners filed their Federal Income Tax returns for all years on the cash receipts and disbursements basis.

12. The respondent on May 5, 1939, mailed his deficiency notice to the petitioners. The appeal was filed with this Board on June 1, 1939, under Docket No. 98897.

13. In said deficiency notice the respondent segregated \$15,246.57 of the amount received by petitioners as just compensation under the final decree referred to in Paragraph 9 and included said amount in ordinary income as interest. The profit on the condemnation of the property was held by the Commissioner to constitute capital gain, and the amount of the capital gain was computed by the respondent to be \$4,756.78. The computation of this amount by the respondent is set forth in the deficiency notice at Pages 5 and 6.

14. The cost basis to the petitioners as of April 2, 1927 is \$35,000.00 for the land (including 400 feet not taken by condemnation proceedings) and \$15,000.00 for the building. The useful life of the building and improvements was forty (40) years from April 2, 1927, the date of acquisition by petitioner.

15. The deficiency for 1937 proposed in the deficiency letter dated May 5, 1939, was paid by the petitioners on May 10, 1940, to the Collector of Internal Revenue at Newark, New Jersey, together with interest in the amount of \$365.28, a total of \$3,175.10. This deficiency has not been assessed.

16. The deficiency proposed for the year 1936 was paid on October 8, 1938, to the Collector of Internal Revenue at Newark, New Jersey, together with interest thereon in the amount of \$1.58, a total of \$18.64, but

has never been assessed and there is a deficiency in assessment but not in payment of said amount of \$17.08 and interest, in respect of the year 1936.

HARRY FRIEDMAN,

Harry Friedman

JULIEN W. NEWMAN,

Julien W. Newman

Counsel for Petitioners.

J. P. WENCHEL,

Chief Counsel

Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

SUPPLEMENTAL STIPULATION

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true upon the trial of the foregoing case, subject to the right of either party to object to the relevancy or materiality of any of the facts herein stated, and subject further to the right of either party to introduce other and further evidence not inconsistent with any of the facts herein stated:

17. By virtue of the resolution set out in Paragraph 7 of the stipulation of facts, the City of New York took possession of the petitioner's property on January 3, 1933, claiming that by virtue of said resolution title thereto vested in it on January 3, 1933. After January 3, 1933 all rents from the property were collected and retained by the City. The petitioner prior to January 3, 1933 collected \$25.00 rent from a tenant applicable to the month of January 3, 1933, but the portion of said collection applicable to the portion of said month from January 3d to January 31st, was paid by the peti-

tioner to the City. The building and improvements were razed by the City in July 1935.

HARRY FRIEDMAN.

Harry Friedman.

JULIEN W. NEWMAN,

Julien W. Newman,

Counsel for Petitioners.

J. P. WENCHEL, A. W. C.,

Chief Counsel.

Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, PETITIONERS, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 98897. Promulgated April 24, 1941.

1. **SALE OR EXCHANGE.**—The taking of property by condemnation and the payment of just compensation is a sale or exchange within the meaning of section 117 (a) of the Revenue Act of 1936 and the profit from that transaction is a capital gain.

2. **JUST COMPENSATION FOR PROPERTY TAKEN BY CONDEMNATION.**—The entire amount received as just compensation for property taken by condemnation is *held* to be the amount realized from the disposition of the property even though the computation by which it was determined included interest on a principal amount from a date prior to the date of actual payment of the award.

3. **CAPITAL ASSETS—PERIOD OF HOLDING.**—The city of New York condemned property for street purposes and took actual possession on January 3, 1933, under a resolution of the board of estimates and apportionment, which had provided that title in fee to the property should vest in the city on that date. The condemnation proceeding continued for several years thereafter and payment of just compensation was not made and no provision therefor was made until May 12, 1937. *Held*, that, since under the laws of New York title to the property did not pass from the taxpayer

until May 12, 1937, the period of holding for the purpose of section 117 (a) continued until that date.

Harry Friedman, Esq., and Julien W. Newman, Esq., for the petitioners.

Arthur W. Carnduff, Esq., for the respondent.

OPINION.

MURDOCK: The Commissioner determined a deficiency in income tax for the calendar year 1936 in the amount of \$17.08 and a deficiency in income tax for the calendar year 1937 in the amount of \$2,809.82. There is no issue for decision by the Board in regard to the year 1936. The issues for decision are: (1) Whether the profit realized by the petitioner upon the taking by condemnation of a capital asset is taxable as a capital gain or as ordinary income; (2) if it is a capital gain, whether a portion of the total amount received is taxable as interest; and (3) the period for which the property was held by the taxpayer within the meaning of section 117 (a) of the Revenue Act of 1936. The facts have been stipulated and the Board adopts the stipulated facts as its findings of fact.

Henry A. Kieselbach inherited a piece of property from his father on April 2, 1927. The city of New York, for the purpose of opening and extending certain streets, filed a proceeding in court late in 1930, asking for authority, *inter alia*, to condemn the building and improvements and a certain portion of the land owned by the petitioner. The court on that same day entered an order granting the application and providing that the compensation should be determined by the court. The taxpayer filed his formal claim for just compensation. The board of estimates and apportionment passed a resolution on December 16, 1932, providing, among other things, that the title in fee to the real property in question should become vested in the city on January 3, 1933. The city took possession on

that date. The condemnation proceeding was tried between March 25, 1933, and February 19, 1935. The court entered its tentative decree on February 17, 1936, fixing tentative awards and assessments. The taxpayer, on March 10, 1935, filed objections to the tentative decree. Hearings were held on the objections during March and April of 1936. The amount of the assessment against the petitioner was reduced upon consideration of his objections. The court entered a final decree on March 31, 1937, providing that the amount awarded to the owners of the properties was the just compensation to which they were entitled. Both the city and the petitioner had a right to appeal from this final decree within 30 days. No appeal was taken. The amount awarded to the petitioner was \$73,246.57 and that amount was paid to the petitioner on May 12, 1937. That total amount was computed by adding, to a principal amount of \$58,000, interest thereon at 6 percent from January 3, 1933. The interest amounted to \$15,246.57. No deposit or other security to cover just compensation was made or provided by the city at any time prior to final payment.

The petitioners filed their income tax returns on the basis of cash receipts and disbursements. The Commissioner, in determining the deficiency, held that the amount of \$15,246.57 was interest and taxable as ordinary income, while the remainder of the award represented the amount received from the sale or exchange of a capital asset, and that 40 percent, or \$4,756.78, of the excess of that amount over the basis for gain or loss on the property was taxable under section 117 (a).

The Commissioner has made the affirmative contention that the taking of the property by condemnation was not a sale or exchange and he erred in treating any of the profit from the transaction as a capital gain. This contention is not only contrary to the general law on the subject of condemnation proceedings but is also

contrary to the previous rulings of the Bureau. See Notice of Deficiency; I. T. 1378, C. B. I-2, p. 26; A. R. R. 4899, C. B. III-1, p. 56. The contention was made apparently as a hedge against the possibility that the Commissioner would not be sustained in the contentions which he was making before the Supreme Court in the *Hammel* and *Electro-Chemical Engraving Co.* cases. The Supreme Court sustained the Commissioner in those cases, *Helvering v. Hammel*, — U. S. — (1/6/41); *Electro-Chemical Engraving Co. v. Commissioner*, — U. S. — (1/6/41), and held that section 117 applies to forced sales as well as to voluntary sales, so that the loss of a mortgagor on foreclosure is a capital loss. The Board and the Second Circuit Court of Appeals have held that a condemnation proceeding is a sale or exchange within the meaning of section 117, and upon authority of those cases this point is decided for the petitioner. *Estate of Edgar S. Appleby*, 41 B. T. A. 18; *Seaside Improvement Co. v. Commissioner*, 105 Fed. (2d) 990; certiorari denied, 308 U. S. 618. Cf. *William Flaccus Oak Leather Co. v. Commissioner*, 114 Fed. (2d) 783, wherein the Court of Appeals for the Third Circuit, to which this case would go if appealed, refused to follow *Herder v. Helvering*, 106 Fed. (2d) 153, and held that the profits from a fire insurance policy upon a capital asset were received as a result of a sale or exchange and were taxable as capital gain.

The petitioner contends that the Commissioner erred in taxing any part of the award of just compensation as interest. This contention is sustained upon the authority of *Estate of Edgar S. Appleby*, *supra*, following *Seaside Improvement Co. v. Commissioner*, *supra*, reversing in part a case reported as *Jamieson Associates, Inc.*, 37 B. T. A. 92.

The petitioner next contends that the period for which it held the property, within the meaning of sec-

tion 117 (a), was more than 10 years. He points out that he was on the basis of cash receipts and disbursements and the transaction was not closed for income tax purposes until he received the money on May 12, 1937, which was more than 10 years after the date of acquisition, April 2, 1927. He also argues that the title to the property remained in him until May 12, 1937, when the money was paid to him. The Board stated in *E. F. Blaise*, 42 B. T. A. 1232, that the word "held" in section 117 (a) is synonymous with "own" and the Board is bound by the state rule of property as to ownership. The petitioner cites *Garrison v. City of New York*, 88 U. S. 196, to show that under the rule of property in the State of New York the title did not pass until May 12, 1937. The following quotation from the opinion in that case bears out this contention:

* * * Any declaration in the statute that the title will vest at a particular time, must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of the compensation, or provision for its payment, to precede the taking, or, at least, to be concurrent with it.

See also *Bauman v. Ross*, 167 U. S. 548, 598, where the Court stated that title to land being taken by condemnation remains in the owners as if no proceedings for condemnation had been had until just compensation has been paid. The respondent has not cited any cases to the contrary or made any argument to indicate that these cases do not correctly state the rule of law in New York. The property was held for more than 10 years.

Decision will be entered under Rule 50.

Arundell, Black & Tyson dissent on the authority of *Helvering v. William Flaccus Oak Leather Co.*, — U. S. — (Apr. 28, 1941).

UNITED STATES BOARD OF TAX APPEALS

Docket No. 98897.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

DECISION

The respondent on July 9, 1941, filed a proposed computation, pursuant to the Board's Opinion promulgated April 24, 1941. The petitioner filed a notice of acquiescence to said computation on July 17, 1941. Therefore, it is

ORDERED and DECIDED, that there is an overpayment in income tax for the year 1937 in the amount of \$2,538.96, which was paid after the mailing of the notice of deficiency.

(Signed) J. E. MURDOCK, *Member*.

Enter: Entered AUG. 5, 1941.

UNITED STATES BOARD OF TAX APPEALS

Docket No. 98897.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ORDER

It appearing that the year 1936 was omitted from the Board's Decision of August 5, 1941, it is

ORDERED, that said Decision be amended to include 1936 and to read: "There is a deficiency in income tax

for the year 1936 in the amount of \$17.08 and an overpayment for the year 1937 in the amount of \$2,538.96, which amount was paid after the mailing of the notice of deficiency."

(Signed) J. E. MURDOCK, *Member*.

Dated—Washington, D. C., August 28, 1941.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

B. T. A. DOCKET NO. 98897

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER ON REVIEW.

v.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH,
RESPONDENTS ON REVIEW.

PETITION FOR REVIEW

GUY T. HELVERING, Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Third Circuit to review the decision entered by the United States Board of Tax Appeals on August 5, 1941, as amended by its supplemental order dated August 28, 1941, ordering and deciding that there is an overpayment for the year 1937 in the amount of \$2,538.96 due Henry A. Kieselbach and Olga M. Kieselbach, respondents on review herein.

The respondents on review, Henry A. Kieselbach and Olga M. Kieselbach, are residents of Montclair, New Jersey, and filed an income tax return for the calendar year 1937 in the office of the Collector of Internal Revenue for the Fifth District of New Jersey, located at Newark, New Jersey, which collection district is within

the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit, wherein this review is sought.

(Signed) SAMUEL O. CLARK, Jr.
Assistant Attorney General.

(Signed) J. P. WENCHEL

RLW

J. P. Wenchel,
*Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review.*

OF COUNSEL:

CLAUDE R. MARSHALL,
*Special Attorney,
Bureau of Internal Revenue.*

CRM/cal
10/14/41

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

B. T. A. DOCKET NO. 98897

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER ON REVIEW,

v.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, RE-
SPONDENTS ON REVIEW

NOTICE OF FILING PETITION FOR REVIEW

To: Henry A. Kieselbach, Olga M. Kieselbach, 43
Myrtle Avenue, Montclair, New Jersey.

You are hereby notified that the Commissioner of Internal Revenue did, on the 27th day of October, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review

by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 27th day of October, 1941.

(Signed) J. P. WENCHER

RLW

J. P. Wencher,

Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 29 day of October 1941.

HENRY A. KIESELBACH,

OLGA M. KIESELBACH,

Respondents on Review.

CRM/csl

10/14/41

[fol. 42] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7912

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HENRY A. KIESELBACH and OLGA M. KIESELBACH,
Respondents

And afterwards, to wit, the 2d day of March, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable William Clark, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 7th day of April, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7912

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

HENRY A. KIESELBACH and OLGA M. KIESELBACH

On Petition for Review of the Decision of the United States
Board of Tax Appeals

OPINION

(Filed April 7, 1942)

Before Clark, Jones and Goodrich, *Circuit Judges*

GOODRICH, *Circuit Judge*:

The taxpayer, Henry Kieselbach, inherited from his father a parcel of real property in the City of New York on April 2, 1927. In 1930 the City of New York began con-

demnation proceedings in the Supreme Court of New York; an order was entered authorizing the taking of the property by the City and providing that compensation would be determined by the Court. The resolution of the New York Board of Estimate and Apportionment, passed pursuant to § 976 of the Greater New York Charter, provided that fee title of the property should become vested in the City January 3, 1933. The City took possession on this date and rents thereafter accruing were collected by or turned over to it. Following litigation as to the amount of compensation, the court on March 31, 1937 entered a final decree entitling the taxpayer to \$73,246.57, computed by adding to the principal sum of \$58,000, interest thereon at 6% per annum from January 3, 1933 to May 12, 1937. The amount fixed in the decree was paid to the taxpayer on the latter date. No deposit or security to cover compensation was given by the City prior to final payment.

The case is brought to this court by the Commissioner from the decision of the Board of Tax Appeals. It embraces three questions, involving the application and interpretation of § 117 of the Revenue Act of 1936. That section provides for the taxation of capital gains and losses upon the sale or exchange of capital assets.¹ The first question is

¹“(a) General rule. In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

“(b) Definition of capital assets. For the purposes of this title, ‘capital assets’ means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included

whether the gain realized from the condemnation of the taxpayer's property was gain from a sale of a capital asset. The second is whether the amount designated as interest in the condemnation award was part of the price, and there- [fol. 45] fore to be taxed as capital gain, or was "true" interest, taxable as ordinary income when received, in 1937. The third concerns itself with the determination of the period for which the taxpayer held this land: is the termination date May 12, 1937, when the price was paid, or January 3, 1933, when the City took fee title and possession? The points will be discussed in the order stated.

Is the transfer of property through condemnation proceedings to be classified as a sale within the meaning of § 117 of the Revenue Act of 1936? The answer to this question will determine whether the increase in value realized by the taxpayer is to be treated as capital gain or ordinary gain, with the corresponding difference as to the base of the tax imposed. The Commissioner makes the suggestion that in view of the statement by the Supreme Court in *Helvering v. William Flaccus Oak Leather Co.*, 313 U. S. 247, 250 (1941),² condemnation of property does not effect a sale within § 117. The Commissioner advanced this position solely for the purpose of preserving the point in the event of an adverse decision in a case then pending in the Ninth Circuit. Since the instant case was argued, however, that decision has come down and the holding is squarely to the effect that taking a property by condemnation does amount to a sale within the meaning of the income tax law. *Hawaiian Gas Products, Ltd. v. Commissioner of Internal Revenue*, — F. (2d) — (C. C. A. 9, 1942). This follows the view of the Second Circuit in *Seaside Improvement Co. v. Commissioner of Internal Revenue*, 105 F. (2d) 990 (C. C. A. 2, 1939); Commissioner

in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 25 U. S. C. A. Int. Rev. Acts, § 117 (a) and (b).

² "We can find nothing in this language [i. e., the language of § 112 (f)] or in other sections of the Act which indicates, either expressly or by implication, that Congress intended to classify as 'sales or exchanges' the involuntary conversions enumerated in § 112(f)."

of *Internal Revenue v. Appleby's Estate*, 123 F. (2d) 700 (C. C. A. 2, 1941) and seems to us, as it did to the courts in the other Circuits, correct, in view of *Helvering v. Hammel*, 311 U. S. 504 (1941) and *Helvering v. Nebraska Bridge Supply & Lumber Co.*, 312 U. S. 666 (1941). We thus have the happy situation of unanimity of opinion upon [fol. 46] a point by the Commissioner, the taxpayer, the Circuit Courts of Appeals and, we think, the Supreme Court of the United States.

The second point involves more difficulty. The Commissioner seeks to tax as ordinary income, rather than as capital gain, that part of the award designated as "interest". The taxpayer resists this on the ground that the very terms of the New York Charter, under which the compensation decree was issued, label the so-called interest "part of the compensation to which . . . owners are entitled". It is pointed out that such is the settled attitude of the courts with regard to condemnation awards and that the holding contended for here has been announced twice by the Circuit Court of Appeals for the Second Circuit.³

The Supreme Court has said several times in cases involving appropriation of land by the United States that the item labelled interest in the award is really part of the "just compensation" to which the property owner is constitutionally entitled.⁴ We have no doubt concerning the authority or the correctness of the decisions cited. Whereas before the taking an owner was in possession of a certain piece of land, he has now, as of the time of payment, so many dollars instead. It would be far from "just compensation", if for the period of time during which the in-

³ *Commissioner of Internal Revenue v. Appleby's Estate*, 123 F. (2d) 700, 701 (C. C. A. 2, 1941); *Seaside Improvement Co. v. Commissioner of Internal Revenue*, 105 F. (2d) 990 (C. C. A. 2, 1939). But note the court's statement, inter alia, in the former case: ". . . if the matter were tabula rasa not all of the court as now constituted would reach that conclusion."

⁴ *United States v. Klamath, etc., Indians*, 304 U. S. 119 (1938); *Shoshone Tribe of Indians v. United States*, 299 U. S. 476, 496 (1937); *Phelps v. United States*, 274 U. S. 341, (1927); *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299 (1923).

dividual had neither payment nor land, he received no additional consideration. But this is not a conclusive treatment of the status of this additional sum for purposes of the Federal income tax. To say that he is entitled to it is not to speak at all with reference to the question of how he is to be taxed upon its receipt. That is a different matter. [fol. 47] The same analysis is equally applicable to those cases which have refused to relieve the government from paying this additional item on the ground that it was interest on an obligation of the government and therefore not collectible, in the absence of a contract to pay.⁵ With those decisions too we agree. Some of them have reached the result indicated by language similar to that found in the cases cited above. Others have adopted the view that this was not the type of obligation to which the statute in question was meant to apply. Be that as it may, the significant factor is that a decision which denies the controlling effect of the "interest" statute upon the question of the plaintiff's right to compensation for the delay in payment does not at the same time answer the problem of how he is to be taxed upon it when he gets it. Again the latter is another matter. This is not one of those cases, nor is our conclusion determined by language used in those instances where the court was dealing with the problem of

⁵ 28 U. S. C. A. § 284: *Phelps v. United States*, 274 U. S. 328 (1927); *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299 (1923).

Another group of cases involves what is now § 22(b)(4) of the Internal Revenue Code, 26 U. S. C. A., which exempts from taxation interest upon the obligations of the state or federal governments. Those decisions are to the effect that the additional payments for condemnation awards are not interest within the purview of the revenue acts. *Holley v. United States*, — F. (2d) — (C. C. A. 6, 1942); *United States Trust Co. of N. Y. v. Anderson*, 65 F. (2d) 575 (C. C. A. 2, 1933); *Posselius v. United States*, 31 F. Supp. 161 (Ct. Cl. 1940); *Williams Land Co. v. United States*, 31 F. Supp. 154 (Ct. Cl. 1940). Here, too, the holdings are not at all determinative of the issue in the instant case, because the problem there was the scope of the exemption provision. Cf. *American Viscose Corp. v. Commissioner of Internal Revenue*, 56 F. (2d) 1033 (C. C. A. 3, 1932).

what makes up "just compensation". Nor do we think the answer is indicated by another group of cases involving awards by the German Mixed Claims Commission where considerations irrelevant here were prevailing there.⁶ The decisions from the Second Circuit cited above are in point. But the matter is *tabula rasa* in this court. With great [fol. 48] deference we believe the answer to be contrary to that reached by the Second Circuit.

The nature of interest in an eminent domain case is stated in 4 Sutherland on Damages (4th Ed. 1916) 4149 as follows: " . . . on general principles interest should be given from the time when the principal should be paid, or, in other words, from the time the landowner was entitled to compensation . . . [Interest] is given, not strictly as damages, but . . . as an equitable mode of compensating the owner for the unnecessary delay in ultimately ascertaining the amount he is entitled to be paid . . . " This seems to us correct. We think the interest, while part of "just compensation", was a payment to the property holder which compensated him for the delay in paying him for his land. Our first impression on the question is thus borne out. The sum of money the taxpayer received was designated as a round sum in principal with interest computed from the date of taking to the date of payment. It seems clear, even apart from everything else, that the principal sum was capital, and the part specified as interest, as we have already said, was compensation for the period during

⁶ *Helvering v. Drier*, 79 F. (2d) 561 (C. C. A. 4, 1935); *Commissioner of Internal Revenue v. Speyer*, 77 F. (2d) 824 (C. C. A. 2, 1935); *Drier v. Helvering*, 72 F. (2d) 76 (C. A. D. C. 1934). In the later case, the court declined to tax the interest as income because the total payment made from German sources would not restore the 1913 value of the property to the taxpayer. In the first two cases it was concluded that until the principal amount of the award had been fully received no part of the payment was to be allocated to interest.

⁷ Also "When the time of taking is ascertained, interest or the amount of damages given follows from that date". 3 Sedgwick, Damages (9th Ed. 1912) § 1179(a). Note (1938) 33 Ill. L. Rev. 361. But cf. (1940) 39 Mich. L. Rev. 169.

which the property owner had neither land nor money. It is, therefore, for income tax purposes, ordinary income, not capital gain.

We come now to the third and final point, involving the period of time during which the taxpayer "held" the property. There is no dispute as to when he acquired it; the difference of opinion comes as to the date at which he ceased to hold it. The Board of Tax Appeals held that date to be May 12, 1937, the day the taxpayer got his [fol. 49] money. If that is correct he held the property for more than ten years and is to be taxed upon only 30% of the capital gain.

Upon this point we disagree with the Board of Tax Appeals. The taxpayer no longer "held" this property after he ceased to be the owner of it. *Shillinglaw v. Commissioner of Internal Revenue*, 99 F. (2d) 87 (C. C. A. 6, 1938) cert. den. 306 U. S. 635 (1938). When did he cease to be the owner? According to the terms of the Greater New York Charter it was on January 3, 1933, at which time title was purportedly vested in the City. At this time, too, the City took possession and thereafter collected the rents. This is the date at which the taxpayer ceased to hold the property, unless the following of the provisions of the charter violates his constitutional rights.

The taxpayer says, however, that it would do so. It is stipulated in the facts that no deposit or security to cover compensation was given by the City prior to final payment. That being so, he contends, a taking prior to payment would be a violation of the provision of the constitutions of both the United States and New York that "private property shall not be taken for public use without just compensation". He cites *Garrison v. The City of New York*, 88 U. S. 196 (1874) and *Bauman v. Ross*, 167 U. S. 548 (1897). It is quite true that in the former case the condemnation decree purported, by its terms, to be "final and conclusive" and that judicial confirmation thereof resulted in passing the fee title to the City of New York. But the question there was whether or not those proceedings were "so far final and conclusive of the right of the City to the property and of the plaintiff to the award, that neither were subject to any legislative or judicial interference". The holding on this point casts no shadow on the issue of the time as of which the property owner ceased to hold his land for purposes of the Federal income tax. The same may be said, likewise, of *Bauman v. Ross*.

So far as the New York law is concerned, *Kahlan v. State of New York*, 223 N. Y. 383, 389, 119 N. E. 883, 885 [fol. 50] (1918) answers the taxpayer's point. The court said that the limitation of the New York constitution, "does not deny the power of the state to take to itself . . . the absolute title to specific private property, provided the statute recognizes the absolute right of the owner; upon the taking of the property, to just compensation and makes provision for the prompt determination and payment of such compensation from the public funds". Such provision for compensation is made in the charter above referred to with the appropriate appeals to preserve the rights of both parties.

That such safeguards are sufficient protection of the property owner's rights under the Constitution of the United States we find settled by adequate Supreme Court holdings to the effect that it is within constitutional limits to provide for the seizure, by eminent domain, of private property without simultaneous payment of "just compensation", as long as "adequate provision be made for compensation". Among these cases are *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 583, 597 (1931); *Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668, 677-678 (1923); *Hays v. Port of Seattle*, 251 U. S. 233, 238 (1920); *Bragg v. Weaver*, 251 U. S. 57, 62 (1919); *Adirondack Ry. Co. v. New York State*, 176 U. S. 335, 349-350 (1900); *Sweet v. Rechel*, 159 U. S. 380 (1895).^{*}

^{*}In the case last cited, the Supreme Court said, with reference to a case cited to it, that it ". . . by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation". (p. 404).

We conclude, therefore, that the taxpayer ceased to hold this property on January 3, 1933. His period of holding, [fol. 51] therefore, comes within that which is over five years and less than ten years and the tax on his capital gain is to be assessed accordingly.

The decision of the Board of Tax Appeals is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Judge Clark did not participate in the decision of this case.

A true Copy: Teste:

_____, Clerk of the United States Circuit Court
of Appeals for the Third Circuit.

[fol. 52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7912

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HENRY A. KIESELBACH and OLGA M. KIESELBACH,
Respondents

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, and the case is remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the opinion of this court.

Herbert F. Goodrich, Circuit Judge.

April 7, 1942.

Endorsements: Order Reversing Decision of the Board of Tax Appeals. Received & Filed Apr. 7, 1942. Wm. P. Rowland, Clerk.

[fol. 53] UNITED STATES OF AMERICA,
 Eastern District of Pennsylvania,
 Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Petitioner, as constituting the portions of the record before this court at argument, and proceedings in this court in the case of Commissioner of Internal Revenue, Petitioner, vs. Henry A. Kieselbach and Olga M. Kieselbach, Respondents, No. 7912, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 4th day of June in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-sixth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 54] IN THE SUPREME COURT OF THE UNITED STATES

HENRY A. KIESELBACH and OLGA M. KIESELBACH, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition for Certiorari to the Circuit Court of Appeals
 for the Third Circuit.

Stipulation

Subject to this Court's approval, it is hereby stipulated that, for the purpose of the petition for a writ of certiorari, the printed record herein may consist of the following:

(1) Appendix B to the brief of the Commissioner of Internal Revenue filed in the Circuit Court of Appeals for the Third Circuit.

(2) The proceedings before said United States Circuit Court of Appeals.

It is further stipulated that the petitioners shall cause the Clerk of the Circuit Court of Appeals to forward to the

Clerk of the Supreme Court the original record on file in his office and that either party may refer to such original record in the petition or in the briefs before this Court, and if the petition for certiorari is granted, a record shall be printed under the supervision of the Clerk of the Supreme Court which shall consist of the proceedings in the Circuit Court of Appeals and such portions of the original record transmitted from the Circuit Court of Appeals to this Court as the parties shall designate, provided that either party may refer to any portions of the certified record which are not printed under the designations of the parties.

Harry Friedman, Attorney for Petitioners. Charles Fahy, Solicitor General, Attorney for Respondent

[Vol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the first question presented by the petition and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3049)